

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JACQUELINE MISHLER,)	
)	No. CV-06-191-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	IN PART AND REMANDING FOR
LINDA S. MCMAHON, ¹)	ADDITIONAL PROCEEDINGS
Commissioner of Social)	PURSUANT TO SENTENCE FOUR 42
Security,)	U.S.C. § 405(g)
)	
Defendant.)	
)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 17.) Attorney Lana C. Glenn represents Plaintiff; Assistant United States Attorney Pamela J. DeRusha and Special Assistant United States Attorney Nancy Mishalanie represent Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's

¹ As of January 20, 2007, Linda S. McMahon succeeded Defendant Commissioner Jo Anne B. Barnhart as Acting Commissioner of Social Security. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Linda S. McMahon should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405 (g).

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN PART
AND REMANDING FOR ADDITIONAL PROCEEDINGS PURSUANT TO SENTENCE
FOUR 42 U.S.C. § 405(g) - 1

1 Motion for Summary Judgment, and remands the matter to the
2 Commissioner for additional proceedings on an expedited basis.

3 **JURISDICTION AND PROCEDURAL HISTORY**

4 On November 18, 1997, Plaintiff Jacqueline Mishler (Plaintiff)
5 protectively filed an application for Social Security Income
6 benefits. (Tr. 143-46.) Plaintiff alleged disability due to
7 fibromyalgia, osteoarthritis, chronic depression, mental problems,
8 anxiety attacks, severe pain and sleeplessness, with an onset date
9 of October 25, 1995. (Tr. 143-46, 166.) Benefits were denied
10 initially and on reconsideration. (Tr. 112.) Plaintiff requested
11 a hearing before an administrative law judge (ALJ), which was held
12 before ALJ Paul Gaughen on May 14, 1999, and continued to August 19,
13 1999. (Tr. 117, 122.) Plaintiff failed to appear at the scheduled
14 hearing, and on August 27, 1999, after filing a Notice to Show Cause
15 for Failure to Appear, ALJ Gaughen dismissed Plaintiff's request for
16 hearing. (Tr. 132.)

17 Plaintiff requested another hearing on October 15, 1999, which
18 was treated as a request to review the ALJ's dismissal; the Appeals
19 Counsel remanded the case to the ALJ. (Tr. 132-33.) A supplemental
20 hearing was held on November 29, 2000, at which Plaintiff appeared
21 with counsel. (Tr. 44-85.) The ALJ allowed records to be submitted
22 post-hearing. He denied benefits on June 20, 2001. (Tr. 14-20.)
23 A request for review was denied by the Appeals Counsel on April 26,
24 2002. (Tr. 6-7, 427-28.) Plaintiff filed a Complaint requesting
25 review of the agency decision by the U.S. District Court for the
26 Eastern District of Washington; Plaintiff's motion for summary
27 judgment was granted in part and remanded to the Commissioner for
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1 additional proceedings on March 27, 2003. (Tr. 431-43.) Plaintiff
2 appeared before ALJ Gaughen again on April 29, 2004, and March 29,
3 2005. (Tr. 696-789.) Additional records were submitted by
4 Plaintiff for the ALJ's review. (Tr. 5A-5C.) Plaintiff, who was
5 represented by counsel, testified. Plaintiff's friend Peggy
6 Patterson, vocational expert Daniel McKinney and medical expert
7 Allen D. Bostwick, Ph.D., also testified. (Tr. 697, 744.) The ALJ
8 denied benefits and the Appeals Council denied review. The instant
9 matter is before this court pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. At the time of the
13 hearing, Plaintiff was 50 years old. She quit school after the
14 ninth grade, but completed her GED and had one year of college.
15 (Tr. 705.) She was a widow and had four children, one of whom lived
16 with her at the time of the hearing. She had no consistent work
17 history. (Tr. 735.) She stated her friend drove her to the store
18 and helped her shop because she had trouble due to pain and
19 stiffness. (Tr. 769.) She testified her 13-year old son and friend
20 helped her with household chores because she suffered ongoing pain
21 from migraines and stiffness in her joints. (Tr. 769, 771-72.) She
22 testified she has been the victim of physical and mental abuse from
23 her boyfriend and continued to experience panic attacks frequently.
24 (Tr. 773, 779.) She also stated the medications she took caused
25 her drowsiness and dry mouth. (Tr. 767-68.)

26 **ADMINISTRATIVE DECISION**

27 At step one, ALJ Gaughen found Plaintiff had not engaged in
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1 substantial gainful activity during the relevant time. (Tr. 19.)
2 At steps two and three, he found her degenerative arthritis of the
3 right knee and right hip and fibromyalgia were "severe" physical
4 impairments that did not meet or equal the Listings. (Tr. 412.) He
5 found Plaintiff's allegations regarding her limitation were not
6 fully credible. (Tr. 409-10.) He concluded Plaintiff retained the
7 residual functional capacity (RFC) for light to medium work, with
8 the following restrictions: "She can lift and carry 20 pounds
9 frequently and 35 pounds occasionally. She can stand and walk 6
10 hours in an 8-hour workday. She can occasionally engage in
11 stooping, crouching, or balancing. She should avoid kneeling or
12 crawling, and exposure to unprotected heights." (Tr. 412.) He
13 found she had no past relevant work, and considering testimony from
14 the vocational expert, determined she could perform other light and
15 sedentary jobs in the national economy such as assembly, production
16 inspector, and hand packager. (Tr. 413.)

17 STANDARD OF REVIEW

18 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
19 court set out the standard of review:

20 A district court's order upholding the Commissioner's
21 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
22 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
23 Commissioner may be reversed only if it is not supported
24 by substantial evidence or if it is based on legal error.
25 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
26 Substantial evidence is defined as being more than a mere
27 scintilla, but less than a preponderance. *Id.* at 1098.
28 Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner*, 169

1 F.3d 595, 599 (9th Cir. 1999).

2 The ALJ is responsible for determining credibility,
3 resolving conflicts in medical testimony, and resolving
4 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
5 Cir. 1995). The ALJ's determinations of law are reviewed
6 *de novo*, although deference is owed to a reasonable
7 construction of the applicable statutes. *McNatt v. Apfel*,
8 201 F.3d 1084, 1087 (9th Cir. 2000).

9 SEQUENTIAL PROCESS

10 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
11 requirements necessary to establish disability:

12 Under the Social Security Act, individuals who are
13 "under a disability" are eligible to receive benefits. 42
14 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
15 medically determinable physical or mental impairment"
16 which prevents one from engaging "in any substantial
17 gainful activity" and is expected to result in death or
18 last "for a continuous period of not less than 12 months."
19 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
20 from "anatomical, physiological, or psychological
21 abnormalities which are demonstrable by medically
22 acceptable clinical and laboratory diagnostic techniques."
23 42 U.S.C. § 423(d)(3). The Act also provides that a
24 claimant will be eligible for benefits only if his
25 impairments "are of such severity that he is not only
26 unable to do his previous work but cannot, considering his
27 age, education and work experience, engage in any other
28 kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

29 In evaluating whether a claimant suffers from a
30 disability, an ALJ must apply a five-step sequential
31 inquiry addressing both components of the definition,
32 until a question is answered affirmatively or negatively
33 in such a way that an ultimate determination can be made.
34 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
35 claimant bears the burden of proving that [s]he is
36 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
37 1999). This requires the presentation of "complete and
38 detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

39 It is the role of the trier of fact, not this court, to resolve
40 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence

1 supports more than one rational interpretation, the court may not
2 substitute its judgment for that of the Commissioner. *Tackett*, 180
3 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
4 Nevertheless, a decision supported by substantial evidence will
5 still be set aside if the proper legal standards were not applied in
6 weighing the evidence and making the decision. *Browner v. Secretary*
7 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
8 there is substantial evidence to support the administrative
9 findings, or if there is conflicting evidence that will support a
10 finding of either disability or non-disability, the finding of the
11 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
12 1230 (9th Cir. 1987).

13 ISSUES

14 The question is whether the ALJ's decision is supported by
15 substantial evidence and free of legal error. Specifically,
16 Plaintiff argues the ALJ erred when he 1) improperly rejected
17 treating and examining physicians' opinions; 2) found Plaintiff not
18 credible; 3) improperly rejected lay testimony; and 4) relied on
19 vocational expert testimony based on an incomplete hypothetical.
20 (Ct. Rec. 13 at 34-41.)

21 DISCUSSION

22 A. Step Two: Mental Impairments

23 To satisfy step two's requirement of a severe impairment, the
24 Plaintiff must provide medical evidence consisting of signs,
25 symptoms, and laboratory findings; the claimant's own statement of
26 symptoms alone will not suffice. 20 C.F.R. § 416.908. The effects
27 of all symptoms must be evaluated on the basis of a medically
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1 determinable impairment which can be shown to be the cause of the
2 symptoms. 20. C.F.R. § 416.929. The Commissioner has passed
3 regulations which guide dismissal of claims at step two. Those
4 regulations state an impairment may be found to be not severe *only*
5 when evidence establishes a "slight abnormality" on an individual's
6 ability to work. *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir.
7 1988) (citing Social Security Ruling 85-28). The ALJ must consider
8 the combined effect of all of the claimant's impairments on the
9 ability to function, without regard to whether each alone was
10 sufficiently severe. See 42 U.S.C. § 423(d)(2)(B) (Supp. III 1991).
11 The step two inquiry is a *de minimis* screening device to dispose of
12 groundless or frivolous claims. *Bowen v. Yuckert*, 482 U.S. 137,
13 153-154.

14 In its review of the ALJ's June 20, 2001 decision (Tr. 420-26),
15 the district court found as follows:

16 Given the mental health history of continuing
17 evaluations, consistent diagnoses, and use of medications
18 including Prozac, Trazadone, Elavil, Zoloft, and a
19 voluntary hospitalization for two weeks following a
20 suicide attempt, the court concludes there is a sufficient
21 demonstration of a mental health impairment to meet the
22 Step Two severity requirements. Accordingly, the ALJ's
23 decision regarding a non-severe mental health impairment
24 was error.

25 (Tr. 442.) (Citations to the record omitted.)

26 For reasons unclear, on remand, the ALJ found Plaintiff only
27 had severe physical impairments at step two. (Tr. 412.) However,
28 the record to date evidences continued diagnoses of mental disorders
by treating, examining and non-examining doctors.

For example, clinic notes from Plaintiff's treating physician
Andrea McCrady, M.D., indicate that from July to October 2003,

1 Plaintiff was diagnosed with depression with panic disorder,
2 intermittent fibromyalgia,² myofascial back pain, chronic panic
3 disorder and chronic pain. (Tr. 605-10.) From December 2003 to
4 March 2004, Dr. McCrady reported diagnoses of major depression,
5 anxiety, fibromyalgia and myocitis. She prescribed medication for
6 depression, anxiety, pain and other symptoms. (Tr. 519-24.) In
7 April 2004, Dr. McCrady discontinued Lorazapan (for severe stress)
8 and Darvocet, but continued treating Plaintiff's symptoms with
9 various other medications, including Trazadone, buspirone and
10 hydrocodone. (Tr. 526.) Plaintiff was also referred to mental
11 health services for counseling and medication evaluation, and pool
12 therapy for fibromyalgia and pain control. (Tr. 520, 526, 542.)

13 In February 2003, examining psychologist James Bailey, Ph.D.,
14 diagnosed Plaintiff with chronic dysthymic disorder, panic disorder
15 with agoraphobia, and dependent personality disorder. (Tr. 689,
16 693.) He noted "marked" severity in Plaintiff's verbal expression
17 of anxiety, motor retardation,³ and ability to interact appropriately
18

19 ² A report from examining physician, William Bozarth, M.D.,
20 indicates Plaintiff also was seen by Dr. Stevenson, rheumatologist,
21 for fibromyalgia on July 9, 2003. Although it is not totally clear
22 from the records, it appears he diagnosed fibromyalgia; Dr.
23 Stevenson prescribed bupropion and Paxil. (Tr. 646.)
24

25 ³ Medical expert Dr. Bostwick explained "motor retardation"
26 refers to "motoric slowness," as in "slow responses, lack of
27 animation, sometimes retarded speech . . . the rate of speech will
28 be slow. . . . or they'll walk slow and kind of listless." (Tr.

1 in public contacts, and "moderate" severity in social withdrawal,
2 depressed mood and suicidal trends. (Tr. 693.) Regarding
3 Plaintiff's functional limitations, he found her moderately limited
4 in several cognitive and social categories and markedly limited in
5 her ability to interact appropriately in public contacts. (Tr. 694.)
6 His conclusions were based on a medical status exam, the WAIS-III
7 intelligence scale, and the Hamilton Rating Scale for Depression.⁴
8 (Tr. 687-90.) He opined Plaintiff would need a smaller workgroup,
9 limited contact with the public, but could do simple multi-step
10 tasks, "despite her impairment." (Tr. 690.)

11 In September 2003, Plaintiff was examined by Jay Toews, Ed.D.,
12 Psychologist, who conducted a clinical interview, mental status
13 exam, and administered the WMS-III, Trails A and B, MMPI-2 and
14 Victoria Symptom Validity Test (VSVT). (Tr. 509-518.) Dr. Toews
15 found the MMPI-2 results invalid, with indicators of over-reporting
16 and failure to cooperate. (Tr. 513.) Although he did not diagnose
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18 765.)

19 ⁴ The ALJ rejected Dr. Bailey's opinions, finding "Dr. Bostwick
20 testified . . . that Dr. Bailey's report did not contain objective
21 psychological testing and related an inconsistent diagnosis of post-
22 traumatic stress disorder due to relationship abuse." (Tr. 408.)
23 As noted above, the record shows objective testing was administered.
24 Further, Dr. Bostwick was a non-examining psychologist. The ALJ's
25 reasons for rejecting Dr. Bailey's opinion are not sufficiently
26 specific and legitimate to reject an examining doctor's opinion.
27 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996).
28

1 "malinger" (Tr. 754), he opined malingering and disability-
2 seeking motivation could not be ruled out. (Tr. 515.) Testing
3 revealed no deficits in cognitive functioning or memory. (Tr. 513,
4 515.) Regarding work related activities, Dr. Toews also opined
5 Plaintiff may have problems working in close proximity with others.
6 (Tr. 515.)

7 Records from Family Services Spokane (FSS) indicate Plaintiff
8 participated intermittently in mental health counseling between
9 November 2003 and February 2005. (Tr. 622-39, 674-82.) Jeffrey
10 Hedges, D.O., saw her for medication management during this period,
11 along with Dr. McCrady. (Tr. 677.) Dr. Hedges' diagnoses included
12 probable dysthymia, psychotic disorder NOS, and probable post-
13 traumatic stress disorder. In November 2004, he recommended
14 continued treatment with Effexor and an increase in Geodon.⁵ (Id.)
15 In August 2004, chart notes indicate Dr. Hedges was prescribing
16 Seroquel, an anti-psychotic. (Tr. 678.) In February 2005, mental
17 health notes indicate a change of diagnosis to dysthymic disorder.
18 The counselor noted the diagnosis might change to "adjustment
19

20 ⁵ Geodon, generic name ziprasidone hydrochloride, is prescribed
21 to treat "schizophrenia and the manic episodes of bipolar disorder.
22 . . . Because of its potentially serious side effects, Geodon is
23 typically prescribed only after other medications have proved
24 inadequate." Side effects include drowsiness, dry mouth, energy
25 loss, headache, muscle aches and tightness, among others.
26 *Physician's Desk Reference (PDR) Family Guide to Prescription Drugs*,
27 found at www.pdrhealth.com.
28

1 disorder with disturbance of conduct." (Tr. 679, 681.)

2 At the ALJ hearing, after review of the entire record, medical
3 expert Dr. Bostwick, opined the medical evidence reflected medically
4 determinable psychological impairments. He testified the most
5 consistently reported diagnoses were under Listing 12.04, (affective
6 disorders). (Tr. 753.) He opined Plaintiff's records establish the
7 medically determinable psychological impairment of dysthymia, which
8 "captures her affective disorder over time." (Tr. 757.) He noted
9 personality disorder "has been relative consistent over time," along
10 with "avoidant/dependent and possibly borderline traits." (Id.)
11 This testimony is supported by the record. Even if Plaintiff did
12 not suffer from a single, chronic condition, the evidence
13 establishes a combination of medically determinable conditions and
14 treatment with medications with serious side effects; thus Plaintiff
15 has met the step two threshold. *Webb v. Barnhart*, 433 F.3d 683, 688
16 (9th Cir. 2005.) As found by this court in its prior order, the ALJ
17 erred when he found no severe mental impairments at step two.

18 **B. Credibility Determinations at Step Two**

19 The ALJ and Dr. Bostwick expressed concerns over Plaintiff's
20 credibility, citing Dr. Toews' psychological testing results that
21 revealed over-reporting and indicators of malingering and
22 disability-seeking motivation. (Tr. 409, 515, 755.) The ALJ also
23 discounted Plaintiff's allegations of impairment caused by pain and
24 mental impairments based on her activities of daily living, prior
25 alcohol use, and her attendance at AA and Al-Anon meetings and
26 church. (Tr. 409-10.) The ALJ concluded, "After careful review and
27 consideration of all of the evidence, the undersigned finds several

1 inconsistencies and contradictions in the evidence overall and in
2 the allegations made by the claimant" and found her less than fully
3 credible. (Tr. 410.) However, for purposes of a step two finding,
4 where there is no inconsistency between a claimant's complaints and
5 her doctors' diagnoses, a claim cannot be found "groundless" under
6 the *de minimis* standard of step two. *Webb*, 433 F.3d at 688 (*c.f.*
7 *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005) (step two denial
8 affirmed where record had contained no objective evidence and
9 claimant's doctor hesitant to conclude symptoms and complaints were
10 medically legitimate).

11 Here, Plaintiff's complaints are consistent with the medical
12 record in its entirety, which shows intermittent diagnoses of
13 depression, panic disorder with agoraphobia, personality disorder,
14 chronic pain, and dysthymic disorder, as well as testimony by the
15 medical expert that there was a medically determinable mental
16 impairment of dysthymia. Examining psychologist Dr. Bailey (who
17 diagnosed chronic dysthymic disorder and panic disorder with
18 agoraphobia) opined Plaintiff had "marked" and "moderate" severity
19 in several functional categories that would have a significant
20 impact on her work-related activities.⁶ (Tr. 692-93.) Significantly,

21
22 ⁶ A mental impairment generally is considered non-severe for
23 purposes of step two if the degree of limitation in the three
24 functional areas of activities of daily living, social functioning,
25 and concentration, persistence or pace is rated as "none" or "mild"
26 and there have been no episodes of decompensation. 20 C.F.R. §§
27 404.1520a(d)(1), 416.920a(d)(1).
28

1 Plaintiff's treating physician, Dr. McCrady diagnosed and treated
2 Plaintiff for depression and fibromyalgia, prescribing anti-
3 depressants and pain medication to relieve symptoms.⁷ Dr. Bostwick
4 testified that fibromyalgia can contribute to depression because (1)
5 living with the condition can cause some depression, and (2) because
6 fibromyalgia mimics depressive symptoms such as low energy,
7 avoidance of activities, poor sleep and appetite disturbance. (Tr.
8 764.) These symptoms are consistent with Plaintiff's complaints.
9 There is no indication that Dr. McCrady dismissed Plaintiff's
10 complaints as unfounded or refused to treat her reported symptoms.
11 Thus, there is not the total absence of objective medical evidence
12 necessary to preclude a step two finding of "severe" mental
13 impairment. *Webb*, 433 F.3d at 688.

14 CONCLUSION

15 The court once again concludes Plaintiff has met the threshold
16 at step two and the ALJ erred when he found no mental impairments at
17 step two. Although Plaintiff may not succeed in proving she is
18 disabled, as defined by the Social Security Act, the ALJ lacked
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20 ⁷ A treating physician's opinions are given special weight in
21 social security proceedings because of his or her familiarity with
22 the claimant and her physical condition. See *Fair v. Bowen*, 885
23 F.2d 597, 604-05 (9th Cir. 1989). The ALJ cannot ignore or reject
24 uncontradicted treating physician opinions without giving "clear and
25 convincing" reasons. Even if Dr. McCrady's opinions are
26 contradicted, the ALJ must give specific and legitimate reasons that
27 are supported by the record. *Lester*, 81 F.3d at 830-31.

1 substantial evidence to find no medically severe mental impairment.⁸
2 The ALJ should continue the sequential evaluation beyond step two,
3 to include limitations caused by Plaintiff's severe physical and
4 psychological impairments (alone and in combination), pain and
5 medication side effects, as directed by the Regulations. 20 C.F.R.
6 §§ 416.920.929. Accordingly,

7 **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
9 **GRANTED IN PART. This matter is remanded to the Commissioner for**
10 **additional proceedings on an expedited basis, pursuant to sentence**
11

12 ⁸ The ALJ's finding that Plaintiff had no severe mental
13 impairments at step two cannot be considered harmless error. An
14 error may be considered harmless where the error "occurred during an
15 unnecessary exercise or procedure"; is non-prejudicial to the
16 Plaintiff; is considered irrelevant to the determination of non-
17 disability; or if the reviewing court can "confidently conclude"
18 that no reasonable ALJ could have reached a different disability
19 determination if erroneously disregarded testimony was credited.
20 *Stout v. Commissioner, Social Sec. Admin.*, 454 F.3d 1050, 1056 (9th
21 Cir. 2006). The exclusion of medically determinable mental
22 impairments during the sequential evaluation is clearly prejudicial
23 to the Plaintiff; it is not conclusive that a reasonable ALJ,
24 considering Plaintiff's limitations caused by her physical and
25 mental impairments in combination (as required by the Regulations),
26 along with the effects of medication, will determine Plaintiff was
27 not disabled, as defined by the Social Security Act. *Id.*
28

3. An application for attorney fees may be filed by separate motion.

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED February 12, 2007.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE